No. 02-1818

FILED

JUL 14 2003

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In The
Supreme Court of the United States

Alvin S. Kanofsky, Ph.D., and Daniel Kanofsky, M.D., M.P.H., individually and as joint executors of the ESTATE OF PAUL KANOFSKY, Ph.D., and as joint executors of the ESTATE OF PHILIP KANOFSKY,

Petitioners,

v.

UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, LESLIE P. MICHELSON, Ph.D., RICHARD CALMAN, JERRY YORK, RON NAPIORSKY, STANLEY S. BERGEN, JR., HOWARD J. PRIPAS, MARILYN BODOW, PRUDENTIAL INSURANCE COMPANY OF AMERICA, and JOHN DOE(S), individually and in their official capacities,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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28 pp

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

Respondents take issue with the Petitioner's statement of questions presented and restate the questions as follows:

1. Did the Court of Appeals correctly affirm the District Court's dismissal of the Estate of Paul Kanofsky's claims for handicap and disability discrimination for failing to establish the prima facie elements and for failing to establish that the reasons cited by Respondents for the adverse employment actions were a pretext for discrimination?

2. Did the Court of Appeals correctly affirm the District Court's dismissal of the Estate of Paul Kanofsky's claims for age discrimination for failing to establish the prima facie elements and for failing to establish that the reasons cited by Respondents for the adverse employment actions were a pretext for discrimination?

3. Did the Court of Appeals correctly affirm the District Court's dismissal of the Estate of Paul Kanofsky's state law claim for the intentional infliction of emotional distress for failing to establish the elements for such claim?

PARTIES TO THE PROCEEDING

The caption of the case, as set forth by Respondents, contains the names of all the parties. Petitioner is the Estate of Paul Kanofsky. Respondents are the University of Medicine and Dentistry of New Jersey, Leslie P. Michelson, Ph.D., Richard Calman, Jerry York, Ron Napiorsky, Stanley S. Bergen, Jr., Howard J. Pripas and Marilyn Bodow. Petitioner's caption erroneously includes the Estate of Philip Kanofsky as a party.

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COUNTERSTATEMENT OF THE CASE

The Estate of Paul Kanofsky (the "Estate") alleges that the University of Medicine and Dentistry of New Jersey ("UMDNJ") discriminated against and mistreated Dr. Paul Kanofsky in connection with his employment.[1] To the contrary, UMDNJ transferred Dr. Kanofsky to a new position in lieu of terminating him. Once in that position, Dr. Kanofsky spent weeks in training and Respondents repeatedly identified their expectations, explained the deficiencies in Dr. Kanofsky's performance and specified those skills and abilities requiring improvement. Nevertheless, Dr. Kanofsky's performance remained unsatisfactory. Ultimately, after sixteen months in the new position, UMDNJ terminated Dr. Kanofsky because of his inability to perform his duties.

In 1993, Dr. Kanofsky was a systems analyst within UMDNJ-University Hospital's information systems and technology department ("HIST"). As an analyst, he helped to organize and analyze the hospital's vast quantity of data using a software program called "SAS." (DA117-118).[2] HIST began to overhaul the hospital's entire billing system by, among other things, eliminating SAS and implementing a new updated software package. HIST

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[1] The Estate inexplicably filed the Petition for a Writ of Certiorari also on behalf of the Estate of Philip Kanofsky. Philip Kanofsky was Paul Kanofsky's father. Philip Kanofsky's Estate is not a party in this case because, as Petitioner admits, the District Court denied its motion to add Philip Kanofsky's Estate as a party. (Petition, p. 3). For this reason, the Court of Appeals did not consider Philip's Estate to be a party to the appeal. (Pet. Appx., B2, n.1; B3).

[2] "DA" refers to Defendants/Respondents' appendix, and "PA" refers to Petitioner's appendix, submitted to the Court of Appeals.

attempted to train Dr. Kanofsky to learn this new software but, after more than a month of training, Dr. Kanofsky failed to learn the software. (DA118-119; DA122; DA169).

Instead of terminating Dr. Kanofsky, UMDNJ searched for another position that could utilize Dr. Kanofsky's skills and experiences. Respondents located a position in Academic Computing Services in the UMDNJ-New Jersey Medical School ("ACS") where Dr. Kanofsky would be able to use many of the same skills that he used in HIST, including technical knowledge and experience with computers and SAS. (DA136; DA169). In addition, in his new position in ACS, unlike the position in HIST, Dr. Kanofsky would be able to use his statistics background. (PA167).

In June 1993, UMDNJ transferred Dr. Kanofsky to ACS, where he retained his title and received the same salary. HIST eliminated Dr. Kanofsky's former position. (DA119-120; DA123; DA136-138). HIST and ACS were UMDNJ's two computer systems departments and are collectively referred to as the information systems technology group ("IST"). Among its many responsibilities, IST provides technology services to the physicians, faculty and staff of UMDNJ, who are the "clients" of IST. (DA168).

In September 1993, IST reevaluated all thirty-eight of its employees to ensure that each employee's title matched his or her respective duties and responsibilities. IST reevaluated eleven employees higher, fifteen lower, and twelve remained the same. Dr. Kanofsky was one of the fifteen employees whose title was reevaluated lower. IST changed Dr. Kanofsky's title to programmer/analyst-I from programmer/analyst-II to accurately correspond to his actual job duties because he did not, and had never,

supervised anyone. The responsibility for supervising others was the only difference between the two job titles. (DA138; DA171; DA174-180).

As a result of the change in titles, Dr. Kanofsky's salary level changed from range 28-step 7 to range 27-step 7, which decreased his annual salary by approximately $2,500. (DA15; DA136-137; DA139; DA175; DA180; DA185-186). Significantly, IST lowered the titles and salaries of many other employees, including Patrice Gregory, Dr. Kanofsky's new supervisor in ACS, and Jacob Luftman, Dr. Kanofsky's prior supervisor in HIST. (DA175-179). Within several months, however, all fifteen employees whose salaries were lowered, including Dr. Kanofsky, had their salaries returned to their earlier levels. (DA139).

Dr. Kanofsky worked in ACS from June 1993 until October 28, 1994, when he was terminated. During that sixteen month period, Respondents repeatedly worked with Dr. Kanofsky to improve his performance, but his performance remained deficient. For example, Dr. Kanofsky repeatedly failed to meet agreed upon deadlines, he failed to perform basic and essential computer tasks, he demonstrated an inability to prioritize assignments and he failed to complete his work independently. (DA5-11; DA46-86).

Incredibly, Dr. Kanofsky incurred these difficulties even though he spent nearly one month in computer training out of the sixteen months that he worked in ACS, he set and approved most project deadlines, he received repeated assistance in prioritizing his projects and he received numerous marginal and unsatisfactory evaluations that specifically identified the deficiencies in his performance. (DA4-13; DA16-20; DA137-138; DA170). In

fact, on more than twenty (20) separate occasions, Respondents identified deficiencies in Dr. Kanofsky's performance and offered suggestions on how he could improve. (DA5-11; DA46-86). Even Dr. Kanofsky's union representative conceded that UMDNJ trained Dr. Kanofsky and despite such training, it was "clear" that Dr. Kanofsky was "incapable of doing some basic tasks of the job." (DA213; DA215).

Further, the Respondents received numerous complaints from Dr. Kanofsky's clients. Two clients complained that Dr. Kanofsky, while attempting to install software on their computer, inadvertently shut off the computer he was working on. Incredibly, on both occasions, Dr. Kanofsky failed to even realize that he had shut the computer off. (DA10; DA74; DA77). Another client asked that Dr. Kanofsky not be assigned to assist him because he had "the strong impression that [Dr. Kanofsky] does not know what he is doing." (DA71). Other clients complained that despite months on an assignment, Dr. Kanofsky had been completely unproductive and failed "to accomplish anything which led to a positive result in supporting our institution." (DA96; DA97).

Dr. Kanofsky's utter lack of computer skills with DOS and other computer languages was astounding. After all, Dr. Kanofsky had spent more than ten years working with computers in HIST and, as set forth on his résumé, he professed knowledge and experience in multiple computer languages. (PA167).

Despite Respondents' considerable efforts to help Dr. Kanofsky improve his performance, Dr. Kanofsky still failed to perform his required duties. As a result, UMDNJ

terminated Dr. Kanofsky on October 28, 1994. (DA21; DA137; DA171).

Dr. Kanofsky belonged to the Hospital Professionals and Allied Employees of New Jersey, a union with a collective bargaining agreement ("CBA") with UMDNJ. (DA142). The CBA required "just cause" to terminate a member and provided each member with the right to an administrative hearing to appeal a termination. Dr. Kanofsky exercised that right and grieved his termination. (DA149-150). The administrative hearing for the grievance was held on December 6, 1994, approximately five weeks after the termination.

The hearing officer initially was skeptical of Respondents' claim as to Dr. Kanofsky's lack of computer skills. Thus, the hearing officer asked Dr. Kanofsky to identify a basic DOS command. Dr. Kanofsky failed to do so.

After hearing the evidence submitted, the hearing officer was compelled to "agree with his department that [Dr. Kanofsky] could not satisfactorily perform his job duties." (PA173). The hearing officer found that UMDNJ "made every reasonable effort, for over one (1) year, to assist Mr. [sic] Kanofsky in improving his performance to a satisfactory level but his performance remained less than satisfactory." (PA173). The hearing officer concluded that UMDNJ had "just cause" for the termination and dismissed the grievance. (PA173). Dr. Kanofsky did not appeal from that dismissal. Several days after the hearing, Dr. Kanofsky died of gastrointestinal bleeding. (DA201-202).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

In its Petition for Writ of Certiorari, the Estate seeks to appeal the Court of Appeal's affirmance of the District Court's dismissal of three of its claims. The Estate focuses exclusively on the lower courts' alleged failure to consider certain factual allegations. Throughout its Petition, the Estate rambles on, purporting to cite to alleged erroneous factual findings reached by both the Court of Appeals and the District Court, and merely repeating in various iterations its assertion that Dr. Kanofsky was brilliant. These factual allegations are erroneous, but even if they were true, the allegations would be irrelevant to the granting of the Petition. The Estate's disagreement with the lower courts' factual findings do not warrant the granting of its Petition because this Court "do[es] not grant a certiorari to review evidence and discuss particular facts." *United States v. Johnston*, 268 U.S. 220, 227, 45 S. Ct. 496, 69 L. Ed. 925 (1925). This policy has been followed with "particular rigor" where, as here, the "district court and court of appeals are in agreement as to what conclusion the record requires." *Kyles v. Whitley*, 514 U.S. 419, 457-58, 115 S. Ct. 1555, 1577, 131 L. Ed. 2d 490 (1995) (Scalia, J., dissenting).

Because the Estate only argues about alleged factual errors, the Estate fails to set forth any relevant argument justifying the granting of its Petition. The Estate ignores the standard for granting a Petition for Certiorari. The Estate cites no conflict between the Court of Appeals' decision and any other decision, it points out no important questions of law that were incorrectly decided and it identifies no departure from the accepted and usual course of judicial proceedings. Moreover, the Estate disregards

the elements for its claims and it overlooks the unrefuted facts submitted by Respondents contained in the record.

Consequently, the Estate fails to establish any basis, much less a compelling one, for this Court to exercise its discretion and grant the Petition for Writ of Certiorari. Consequently, the Estate's Petition for Writ of Certiorari should be denied.

I. THE THIRD CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF THE ESTATE'S HANDICAP AND DISABILITY DISCRIMINATION CLAIMS

The Third Circuit and the District Court correctly found that the Estate failed to establish either the prima facie elements of handicap and disability discrimination or that the reasons for the alleged adverse employment actions were a pretext for discrimination. The lower courts' factual findings were correct and supported by the record. The alleged factual errors cited by the Estate do not provide a basis for granting the Petition.

A. The Third Circuit and the District Court correctly found that the Estate failed to establish the prima facie elements for its handicap and disability discrimination claims

The District Court correctly found that the Estate failed to present evidence of the second prima facie element, namely that Dr. Kanofsky was qualified to perform the essential functions of his job with or without reasonable accommodations. The District Court also found that the Estate failed to present any evidence to establish the

fourth prima facie element, that the employer sought someone to perform the same work after he left. (Pet. Appx., A10-12). The Court of Appeals agreed with the District Court's findings. (Pet. Appx., B3-B4).

The second prima facie element is whether the employee "is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer." *Gaul v. Lucent Technologies, Inc.*, 134 F.3d 576, 580 (3d Cir. 1998). *See also Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 306 (3d Cir. 1999). Courts apply a two-part test to determine whether an employee meets this prima facie element.

> First, a court must consider whether 'the individual satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc.' Second, the court must consider 'whether or not the individual can perform the essential functions of the position held or desired, with or without reasonable accommodation.'

Gaul, 134 F.3d at 580 (citation omitted). *See also Taylor v. Phoenixville School Dist.*, 184 F.3d at 311.

Petitioner repeatedly argues that Dr. Kanofsky was brilliant, that he received a doctorate degree and had significant work experience. This argument focuses only on the first part of this two-part test, but completely ignores the second part. Indeed, there is no real dispute as to the first half of the test because Respondents have never argued that Dr. Kanofsky had insufficient educational or employment experience. Rather, the Third Circuit and the District Court focused on Dr. Kanofsky's failure to perform the essential functions of his position. The Estate never

provided any evidence to establish this required half of the second prima facie element.

In contrast, Respondents presented overwhelming and undisputed evidence that Dr. Kanofsky, despite his education and employment experience, still failed to perform the essential functions of the job, with or without reasonable accommodation. (DA3-12; DA26-86; DA137-138; DA170). Even Dr. Kanofsky's union representative admitted that it was "clear" that Dr. Kanofsky was "incapable of doing some basic tasks of the job." (DA213; DA215). Further, the hearing officer on Dr. Kanofsky's administrative grievance reached the same conclusion. (PA173). The evidence is overwhelming and undisputed that Dr. Kanofsky failed to perform the essential functions of the job, with or without reasonable accommodation. The Third Circuit and the District Court correctly found, therefore, that Dr. Kanofsky failed to perform the essential functions of his position.

The Estate also claims that Dr. Kanofsky's partial paralysis in his right arm was obvious. Presumably, the Estate makes the contention to support an argument it made to the Court of Appeals (though not here) that Dr. Kanofsky was not required to ask for an accommodation. Such an argument is erroneous because it is insufficient for an employer simply to know of an alleged disability. In addition, the employer must know that as a result of such disability, the employee cannot perform some of his employment duties and may need an accommodation for such duties. *See Taylor v. Phoenixville School Dist.*, 184 F.3d at 313 ("the employer must know of both the disability and the employee's desire for accommodation for that disability."). *Accord Kelly v. Drexel University*, 94 F.3d 102, 109 (3d Cir. 1996).

There is a fundamental distinction "between an employer's knowledge of an employee's disability versus an employer's knowledge of any limitations experienced by the employee as a result of such disability." *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 164 (5th Cir. 1996). This distinction is crucial to anti-discrimination laws because "[e]mployers cannot assume employees are disabled and need accommodations." *Taylor v. Phoenixville School Dist.*, 184 F.3d at 313. *See also Teahan v. Metro-North Commuter R. Co.*, 951 F.2d 511, 515 (2d Cir. 1991) ("An employer obviously may not assume that because a person has a handicap, he or she is unable to function in a given work context.").

Anti-discrimination laws do not "require an employer to assume that an employee with a disability suffers from a limitation. In fact, better public policy dictates the opposite presumption: that disabled employees are not limited in their abilities to adequately perform their jobs." *Taylor v. Principal Financial Group*, 93 F.3d at 164. This principle is true because if employers did make those assumptions, they would be acting on the very prejudices and stereotypes that anti-discrimination laws were meant to eradicate. Consequently, "[e]mployers are obligated to make reasonable accommodations only to the physical or mental *limitations* resulting from the disability that is known to the employer." *Id.* (emphasis in text). Finally, an employee must also establish that the requested accommodation was possible. *Gaul*, 134 F.3d at 580; *Van de Pol v. Caesars Hotel Casino*, 979 F. Supp. 308, 315 (D. N.J. 1997).

As a result, the issues on any handicap discrimination claim include whether the employee experienced any limitations because of a disability, whether the employer

knew of those limitations, whether the employee requested an accommodation because of such limitations and whether the requested accommodation was possible. In the present case, the Estate failed to present evidence establishing any of these issues. To the contrary, the evidence conclusively demonstrated that Dr. Kanofsky's condition was irrelevant to his job performance. Dr. Kanofsky was physically able to perform his duties, he just failed to competently do so. (DA5-11; DA46-86).

Further, Dr. Kanofsky never requested an accommodation. In fact, he never claimed that his condition affected his job performance, including the installation of computer software. (DA14; DA120; DA189; DA189-193; DA199). Dr. Kanofsky's failure to request an accommodation precludes the Estate from establishing that Dr. Kanofsky was qualified. *Jovanovic v. In-Sink-Erator Div. of Emerson Elec.*, 201 F.3d 894, 899 (7th Cir. 2000). *See also Taylor v. Principal Financial Group, Inc.*, 93 F.3d at 165 ("it is the employee's initial request for an accommodation which triggers the employer's obligation to participate in the interactive process of determining" an accommodation). Because the Estate failed to provide any evidence that Respondents were aware of any limitations suffered by Dr. Kanofsky, or that Dr. Kanofsky requested an accommodation, it failed to establish the second prima facie element.

The Estate also cannot establish the fourth prima facie element. Although the Estate ignored this element in its Petition for Writ of Certiorari, the Estate previously admitted that it had no evidence on this issue, stating that "[i]t is unclear whether Dr. Kanofsky was replaced by a younger worker (with no disability) or whether his job duties were transferred to younger workers . . . " (DA218). Because of this admission, the Estate failed to establish the

fourth prima facie element for its disability discrimination claim.

B. The Court of Appeals and the District Court correctly found that the Estate failed to establish that Respondents' reasons for Dr. Kanofsky's termination were a pretext for discrimination

Even if the Estate had evidence to establish its prima facie case, Respondents satisfied the burden of production of articulating a reason for their actions, as required by *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). UMDNJ terminated Dr. Kanofsky because he failed to meet deadlines, failed to prioritize assignments, failed to work independently and failed to perform basic computer tasks. (DA2-12; DA16-20; DA138; DA170).

The Estate must then present evidence demonstrating either that a discriminatory reason more likely than not was a motivating factor in the adverse employment action or that Respondents' proffered reason for the termination was a pretext for discrimination. *Lawrence v. National Westminster Bank*, 98 F.3d 61, 66 (3d Cir. 1996). To prove pretext, the Estate must demonstrate "such weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in the employer's proffered reasons for its action that a reasonable fact finder could find them unworthy of credence and hence infer that the employer did not act for the non-discriminatory reason." *Fuentes v. Perskie*, 32 F.3d 759, 764-65 (3d Cir. 1994). Plaintiff failed to establish these elements.

The Estate never attempted to establish that a discriminatory reason was more likely than not the motivating factor. Instead, the Estate made vague and rambling arguments concerning pretext. For example, the Estate argued that Dr. Kanofsky was brilliant at his former position, that he saved UMDNJ millions of dollars while in HIST and that the reviews of his work suddenly changed in 1993. The Estate also claimed that Patrice Gregory, one of Dr. Kanofsky's ACS supervisors, recommended that he be transferred, not terminated.

In these arguments, the Estate simply contends that UMDNJ made the wrong decision in terminating Dr. Kanofsky. The issue, however, is not whether Dr. Kanofsky's performance was inadequate, but only whether UMDNJ truly believed that Dr. Kanofsky's performance was inadequate. So long as Respondents truly believed their asserted reasons, then pretext has not been shown. *Watson*, 207 F.3d at 222. In other words, the Estate had to present evidence that UMDNJ fabricated its reasons for terminating Dr. Kanofsky and that it did not really terminate him for such reasons. *Swider v. Ha-Lo Industries*, 134 F. Supp. 2d 607, 627 (D. N.J. 2001). The Estate presented no evidence on that issue.

To the contrary, Ms. Gregory agreed with Ms. Bodow and Dr. Michelson (the supervisors who decided to terminate Dr. Kanofsky) that Dr. Kanofsky's performance had been deficient and, despite having marginally improved, remained deficient. (DA195-197). Thus, all of Dr. Kanofsky's supervisors agreed that Dr. Kanofsky's performance was inadequate. The difference of opinion over whether to terminate Dr. Kanofsky for his inferior performance does not establish pretext. Rather, it constitutes second-guessing of the Respondents' decision, which is irrelevant

to pretext. *Silvestre v. Bell Atlantic Corp.*, 973 F. Supp. 475, 483 (D. N.J. 1997), *aff'd*, 156 F.3d 1225 (3d Cir. 1998).

The reason that the Estate has never focused on the correct issue is that the Estate had no evidence relating to that issue. In fact, Dr. Kanofsky's ACS supervisors complained about the same deficiencies in Dr. Kanofsky's performance for more than a year. During that time, on at least twenty (20) separate occasions, Respondents documented deficiencies in Dr. Kanofsky's performance. (DA5-11; DA46-86). Despite Respondents' efforts, Dr. Kanofsky's work never became satisfactory.

In addition, Dr. Kanofsky's deficiencies with computers were almost unimaginable, even though he claimed to be proficient in multiple computer languages. (PA167). As a result, the Respondents received numerous complaints from clients about Dr. Kanofsky's performance. For example, on at least two separate occasions when he was installing software, Dr. Kanofsky inadvertently turned the computer off, yet he failed to realize that fact even after the computer screen went blank. (DA10; DA74; DA77). One client even put a bottle cap over the computer on-off switch to prevent Dr. Kanofsky from inadvertently turning the computer off again. (DA77).

Another client specifically requested that Dr. Kanofsky not be assigned to his future projects. The client explained that on one occasion, Dr. Kanofsky attempted to help with a simple project for over one hour.

> Unfortunately, it soon became clear that I knew more about DOS than Paul does and finally managed to get him to stop 'helping' me. I went to see Cliff Green, who solved the problem in less than 2 minutes.

> After many years of dealing with knowledgeable people in the ACS, I am stunned to encounter someone in your organization who seems to have a total lack of skill in dealing with computers. I have no confidence in Paul Kanofsky and do not want him to have any chance of making a mistake in analyzing data that will eventually appear in a publication.

(DA71). *See also* (DA96-98). Further, the hearing officer on Dr. Kanofsky's administrative grievance, and Dr. Kanofsky's union representative, both agreed with the Respondents that Dr. Kanofsky failed to perform his required duties. (DA213; DA215; PA167).

Significantly, the Estate never disputed that Dr. Kanofsky repeatedly missed deadlines, failed to prioritize assignments and could not perform his computer assignments competently or timely. Thus, the Third Circuit and the District Court correctly found that there is no evidence that the reasons cited by Respondents for their decision to terminate Dr. Kanofsky were pretextual. Therefore, the Estate's disability discrimination claim based on Dr. Kanofsky's termination was appropriately dismissed.

C. The Third Circuit and the District Court correctly found that the Estate failed to establish that UMDNJ's reasons for Dr. Kanofsky's transfer were a pretext for discrimination

The Estate also argues that Dr. Kanofsky's transfer in June 1993 from HIST to ACS was due to discrimination. The Estate cannot allege discrimination for this event because the claim is barred by the two year statute of limitations. *Poveromo-Spring v. Exxon Corp.*, 968 F. Supp. 219,

224-25 (D. N.J. 1997). The Estate did not file its complaint until June 1996, about one year beyond the statute of limitations. (PA20). In any event, the transfer, which only changed Dr. Kanofsky's duties, was not an adverse employment action. *See Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994) ("Changes in duties or working conditions that cause no materially significant disadvantage, such as Harlston's reassignment, are insufficient to establish the adverse conduct required to make a prima facie case."). *See also Crady v. Liberty National Bank and Trust Co. of Indiana*, 993 F.2d 132, 136 (7th Cir. 1993).

Even if the transfer could be cited as an adverse employment action, the Estate failed to establish that the reasons for Dr. Kanofsky's transfer from HIST to ACS were pretextual. UMDNJ transferred Dr. Kanofsky because, after a month of training in the Spring of 1993, he could not learn HIST's new computer system. (DA118-119; DA122; DA169).

The Estate argues that because the new computer system was not fully operational until two years following the transfer, the system could not be the cause for the transfer. In essence, the Estate contends that it makes no sense to transfer an employee until the software is actually installed. This argument constitutes improper second-guessing of the timing of the transfer and whether the decision to transfer was prudent. Simply because it took longer than expected to install new software and then to

transfer the data and billing information to that new system does not establish pretext.[3]

The Estate has never focused on the real issue, namely whether or not UMDNJ truly believed that Dr. Kanofsky was unqualified for the position in HIST because he failed to learn the new software. Notably, the Estate never disputed that UMDNJ attempted to train Dr. Kanofsky on the new software package for over a month and that Dr. Kanofsky failed to learn it. Consequently, the Estate failed to establish that the reasons given for the transfer were a pretext for discrimination.

II. THE THIRD CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF THE ESTATE'S AGE DISCRIMINATION CLAIM

The Third Circuit and the District Court correctly found that the Estate could not establish the prima facie elements for its age discrimination claim, and it could not establish that UMDNJ's cited reasons were a pretext for discrimination. (Pet. Appx., A12-14). The District Court and the Third Circuit agreed that the Estate failed to establish the second prima facie element (that Dr. Kanofsky was qualified for the position) for the reasons set forth *supra*, Point I-A. The Courts also found that the Estate could not establish the fourth element (that he was

[3] The Estate also argues that HIST's advertisement for a job opening more than fifteen months after Dr. Kanofsky's transfer is evidence of pretext. The argument is senseless because HIST advertised for an employee to work on the new software package, the one that Dr. Kanofsky was unable to learn. (DA123; PA139).

replaced by a sufficiently younger person to create an inference of age discrimination) because of the Estate's admission that it had no knowledge whether Dr. Kanofsky was ever replaced. (Pet. Appx., A13).

In *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996), this Court explained that whether the employee was replaced by someone who was "substantially younger" than the plaintiff is probative of age discrimination. If an employee was replaced by someone substantially younger, and the other prima facie elements were established, there would then be "an inference that an employment decision was based on an illegal discriminatory criteria." *Id.*, 517 U.S. at 312 (quoting *International Broth. of Teamsters v. United States*, 431 U.S. 324, 358, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977)). *See also Showalter v. University of Pittsburgh Med. Center*, 190 F.3d 231, 236 (3d Cir. 1999); *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1108 (3d Cir. 1997). This element of the prima facie case is the same whether plaintiff's claim is based on federal or New Jersey discrimination laws. *Keller*, 130 F.3d at 1108; *Swider*, 134 F. Supp. 2d at 625.

This element is fundamental to an age discrimination claim because without proof that the employee was replaced by a sufficiently younger employee, there would be no basis to infer that the employer acted with a discriminatory motive based on age. *Marzano v. Computer Science Corp.*, 91 F.3d 497, 508 (3d Cir. 1996). Without a discriminatory motive, there can be no discrimination claim. *Pivirotto v. Innovative Systems, Inc.*, 191 F.3d 344, 356 (3d Cir. 1999) (finding that *O'Connor* and other Supreme Court precedent require "evidence adequate to create an inference that an employment decision was based on an

illegal discriminatory criteria"); *Swider*, 134 F. Supp. 2d at 626 (dismissing age discrimination claim because the plaintiff "failed to establish that he was replaced by someone sufficiently younger to give rise to an inference of age discrimination.").

Because the Estate admitted that it has no evidence concerning the age of the person who replaced Dr. Kanofsky, either when he was transferred or when he was terminated, there can be no doubt that the Estate failed to establish this element. (DA218).

III. THE THIRD CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF THE ESTATE'S CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Pursuant to *Buckley v. Trenton Sav. Fund Soc'y*, 111 N.J. 355, 366, 544 A.2d 857, 863 (1988), the four elements for a claim for intentional infliction of emotional distress are (1) extreme and outrageous conduct; (2) intent to commit both the act and the emotional distress; (3) proximate cause; and (4) that the emotional distress was so severe that no reasonable person could endure it. (Pet. Appx., A15). The Third Circuit affirmed the District Court's finding that the Estate failed to allege "acts even approaching that which is required" to meet these elements and, therefore, dismissed the claim. (Pet. Appx., A15).

In its Petition, the closest the Estate comes to addressing these elements occurs when it makes vague arguments that UMDNJ terminated Dr. Kanofsky even though it knew he had cancer and was undergoing chemotherapy. This argument is not supported by any evidence

in the record. In fact, the undisputed evidence belies this allegation. UMDNJ terminated Dr. Kanofsky on October 28, 1994 and Dr. Kanofsky did not even learn that he had cancer until November 18, 1994, three weeks after his termination. (PA163; DA220).

There is also no evidence that Dr. Kanofsky suffered any emotional distress, not to mention emotional distress "so severe that a reasonable person could not be expected to endure it." Notably, there is no evidence from Dr. Kanofsky, nor is there any evidence from any physician on this issue. *See Taylor v. Metzger*, 152 N.J. 490, 515, 706 A.2d 685, 697 (1998) (finding that a plaintiff asserting a claim for intentional infliction of emotional distress must show a "severe and disabling emotional condition which may be generally recognized and diagnosed by professionals trained to do so.").

Even if there were some evidence supporting the Estate's allegations, however, the allegations still fail to meet the high threshold required for this tort. The alleged conduct does not "exceed all bounds of decency," nor is it regarded as "atrocious and utterly intolerable in a civilized community." *Buckley*, 111 N.J. at 366, 706 A.2d at 863. Terminating an employee, even one who is ill, simply cannot be considered outrageous and beyond the bounds of decency because "while loss of employment is unfortunate and unquestionably causes hardship, often severe, it is a common event and cannot provide a basis for recovery of intentional infliction of emotional distress." *Cox v. Keystone Carbon Co.*, 861 F.2d 390, 395 (3d Cir. 1988). *See also id.* ("it is extremely rare to find conduct in the employment context which will rise to the level of outrageousness necessary to provide a basis for recovery.").

Consequently, the Third Circuit correctly affirmed the District Court's dismissal of the Estate's intentional infliction of emotional distress claim.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that there is no compelling reason to grant the Estate's Petition. Consequently, the Estate's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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